

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. January 23, 2008
. 8:38 a.m.
.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: This is a continuation of the personal
2 injury estimation trial in W.R. Grace, 01-1139. The
3 participants by phone, John O'Connell, Terence Edwards,
4 Elizabeth Devine, Robert Guttman, Matthew Russell, Jonathan
5 Lewinsohn, Jacob Cohn, Tiffany Cobb, Christopher Candon, Joshua
6 Cutler, James Rieger, Martin Dies, Kirk Hartley, Alex Mueller,
7 Steven Mandelsberg, Andrew Craig, Janet Baer, Ellen Ahern,
8 Andrew Chan, William Corcoran, David Mendelson, Theodore
9 Freedman, Bernard Bailor, Walter Slocombe, Leslie Kelleher,
10 Jeanna Rickards, Mark Hurford, Elihu Inselbuch, Peter Lockwood,
11 Shayne Spencer, James Wehner, Theodore Tacconelli, Jonathan
12 Brownstein, Debra Felder, Scott Baena, Alan Madian, Michael
13 Davis, Katharine Mayer, Daniel Speights, Timothy Cairns, Jeff
14 Waxman, Edward Westbrook, David Beane, Jarrad Wright, Sina
15 Toussi, Marti Murray, David Parsons, Beau Harbour, Brian
16 Mukherjee, Darrell Scott, John Phillips, Jason Solganick, Igor
17 Volshteyn, Francis Monaco, Lewis Kruger and Ari Berman. And
18 I'll take entries in Court. Good morning.

19 MS. HARDING: Good morning, Your Honor. Barbara
20 Harding on behalf of Grace.

21 MR. BERNICK: David Bernick for Grace.

22 MS. AHERN: Ellen Ahern for Grace.

23 MR. McMILLAN: Scott McMillan for Grace.

24 MR. FINCH: Good morning, Your Honor. Nathan Finch
25 for the Asbestos Claimants' Committee.

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1 MR. VAN GRACK: Adam Van Grack, Your Honor, for the
2 Asbestos Claimants' Committee.

3 MR. INSELBUCH: Elihu Inselbuch for the committee.

4 MR. MULLADY: Good morning, Your Honor. Ray Mullady
5 for the FCR.

6 MR. ANSBRO: John Ansbro for the FCR.

7 MS. KRIEGER: Good morning. Arlene Krieger from
8 Stroock for the Official Committee of Unsecured Creditors.

9 MR. HOROWITZ: Good morning, Your Honor. Greg
10 Horowitz from Kramer Levin for the Equity Committee.

11 MR. KRAMER: Your Honor, Matt Kramer, Bilzin Sumberg,
12 on behalf of the Property Damage Committee.

13 MR. FRANKEL: Good morning, Your Honor. Roger
14 Frankel on behalf of the FCR.

15 THE COURT: Excuse me one second.

16 (Pause)

17 THE COURT: Okay. Thank you. Ms. Harding?

18 MS. HARDING: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MS. HARDING: The parties have worked diligently
21 through the evening to condense the designations, and I'm happy
22 to report that we have resolved all of our differences with
23 respect to the testimony, so there will be no testimonial
24 objections during the playing of the various witness testimony.

25 THE COURT: All right.

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1 MS. HARDING: So, the way we intend to proceed is
2 that we will play each witness. At the conclusion -- and we'll
3 play both the debtors' designations and the ACC and FCR's
4 designations, and at the conclusion of each witness the debtors
5 will have certain exhibits that we will move for admission.
6 I'm told that there may be some objections to those documents,
7 and then we'll have to discuss that with Your Honor.

8 THE COURT: All right.

9 MS. HARDING: Okay. If that's acceptable to the
10 Court, then we'll begin with the testimony. I do -- I think it
11 would be helpful to the Court -- Exhibit GG-2094, which was
12 admitted yesterday, Your Honor --

13 THE COURT: All right.

14 MS. HARDING: I have a copy if that would -- may I
15 approach?

16 THE COURT: Yes. I think if you just leave them
17 there -- well, if you just keep them on the floor. I probably
18 will not be looking at the binders while the videos are playing
19 anyway. Thank you. I take it I'm not going to need the
20 binders while the videos are playing, correct?

21 MS. HARDING: That's correct.

22 THE COURT: All right.

23 MS. HARDING: Because the binders do include certain
24 exhibits, we won't be offering them to the Court until the end
25 of the day, and we know which exhibits have been admitted.

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1 THE COURT: All right.

2 MS. HARDING: Okay. And just for the Court's
3 reference, some of the doctors were referred to in the chart
4 prepared by Dr. Henry yesterday. The first witness is Dr.
5 Phillip Lucas, who I believe is the fourth from the bottom
6 doctor listed on Dr. Henry's chart.

7 THE COURT: All right. One second.

8 MS. HARDING: And with that, Your Honor, we'll just
9 start the playing, and then we'll move for the admission of the
10 documents at the end.

11 THE COURT: Okay. Thank you.

12 (Videotaped deposition of Dr. Lucas played into the record)

13 THE COURT: Whoever is using a Blackberry, or some
14 other device, I thought they were all taken. It's on the tape.

15 UNIDENTIFIED SPEAKER: Your Honor, it's on the tape.

16 THE COURT: It's on the tape?

17 UNIDENTIFIED SPEAKER: It's on the tape.

18 THE COURT: Okay. Sorry. Start again, please. I
19 apologize.

20 MR. BERNICK: Do you want to have the question read
21 back?

22 THE COURT: No. I'm following. Thank you.

23 (Videotaped deposition of Dr. Lucas played into the record)

24 THE COURT: I'm sorry. Now I'm not following. I
25 can't understand it now. I'm sorry.

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1 UNIDENTIFIED SPEAKER: That section, an audio problem
2 on the tape itself --

3 THE COURT: Could you just back it up so that I can
4 read it, then? Because it goes too fast. I can hear it, but I
5 can't read it.

6 UNIDENTIFIED SPEAKER: Okay.

7 (Videotaped Deposition of Dr. Lucas played into the record)

8 UNIDENTIFIED SPEAKER: (Indiscernible).

9 THE COURT: I'm sorry. Where did you back up to?

10 UNIDENTIFIED SPEAKER: Forty-one twenty.

11 THE COURT: I'm sorry. I'm not taking -- I don't
12 know what the designations are. Where I was. How about -- can
13 you go back to re -- Exhibit 4, where the guidelines for ILO
14 classification were? Because I got that. And so -- whatever
15 comes after that, where I didn't pick it up, I --

16 UNIDENTIFIED SPEAKER: 46, Line 4.

17 (Videotaped deposition of Dr. Lucas played into the record)

18 THE COURT: You can keep going. It's fine.

19 UNIDENTIFIED SPEAKER: Yes, but that's the -- that
20 concludes Lucas.

21 MS. HARDING: No. There's one more. There's one
22 more that was -- actually, I think that's the (indiscernible)
23 that wasn't included.

24 UNIDENTIFIED ATTORNEY: There is more?

25 UNIDENTIFIED SPEAKER: (Indiscernible).

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1 UNIDENTIFIED SPEAKER: No.

2 UNIDENTIFIED SPEAKER: Are we done with it?

3 (Pause)

4 UNIDENTIFIED SPEAKER: Barbara, is there more?

5 MS. HARDING: Yes, as I understand it, there is a
6 couple lines that were evidently cut out, and --

7 UNIDENTIFIED SPEAKER: Why don't we just read them?

8 UNIDENTIFIED SPEAKER: (Indiscernible).

9 MS. HARDING: Okay. Go ahead. Thank you, Tim.

10 (Videotaped deposition of Dr. Lucas played into the record)

11 MS. HARDING: That's it. Your Honor, may I approach
12 and hand you the binder for Dr. Lucas so you could see the
13 document we'll be seeking to admit?

14 THE COURT: Yes.

15 MS. HARDING: Thank you.

16 THE COURT: Thank you.

17 (Pause)

18 THE COURT: I take it -- because I didn't ask
19 earlier, so I'll just ask this question generally that all of
20 these witnesses were appropriately sworn because none of -- the
21 tape started after the swearing in, so, is that going to be
22 true for all of these witnesses, they would have been sworn in
23 by the reporter at the time that the deposition started?

24 MS. HARDING: Yes, Your Honor.

25 THE COURT: Okay, thank you.

1 MS. HARDING: And Your Honor, the debtors will be
2 -- during the course of the trial -- be presenting summaries of
3 the information submitted by claimants in this case with
4 respect to various doctors, the numbers of times that they've
5 been listed as diagnosing doctors and the number of times that
6 they've enlisted as B-readers just on the face of the
7 questionnaire. It doesn't include the times that they've
8 included their documents as the diagnosing doctors or B-readers
9 and their attachments, as well -- as well as further testimony
10 from witnesses concerning various practices of various doctors.

11 THE COURT: All right.

12 MS. HARDING: Okay. Your Honor, based on Dr. Lucas'
13 testimony, we do have several exhibits that we'd like to move
14 for admission. The first one, it's in your notebook, is
15 GX0170. There's been no objection noted to date.

16 THE COURT: Any objection? This is?

17 MS. HARDING: This is the -- it's a document that is
18 the -- Dr. Lucas' prescription for a group of individuals to
19 get x-rays.

20 MR. FINCH: That's not --

21 THE COURT: This one just says, Donald Par Hunnicut
22 (phonetic)

23 MR. FINCH: Yes, Donald Hunnicut.

24 MS. HARDING: I apologize, I'm looking at the wrong
25 one. I apologize.

1 THE COURT: Any objection?

2 MR. FINCH: I need to know what the exhibit is. I
3 don't think so, but I need to know the right --

4 MS. HARDING: I'm sorry.

5 THE COURT: You need to use the microphone, Mr.
6 Finch.

7 MR. FINCH: Sure. I don't think so, but I need to
8 know the right exhibit number.

9 THE COURT: 170.

10 MR. FINCH: Well, except the 170 is not the
11 prescription.

12 MS. HARDING: I apologize. 170 is just a medical
13 record -- I'm sorry, a business record of Dr. Lucas that lists
14 information about his diagnosis of a particular patient.

15 THE COURT: Are you offering 170?

16 MS. HARDING: Yes, we're offering 170.

17 MR. FINCH: Okay. No objection to Number 170
18 -- Grace 170.

19 THE COURT: It's admitted.

20 MS. HARDING: The debtors move to admit 168 which is
21 the prescription for a group of individuals to get --

22 MR. FINCH: No objection to Grace 168.

23 THE COURT: All right, just a second. All right,
24 it's admitted.

25 MS. HARDING: The debtors move for the admission of

1 GX0172 which is Dr. Lucas' B-read of Mr. Gonzalin (phonetic).

2 MR. FINCH: No objection to 172.

3 THE COURT: One second. It's admitted.

4 MS. HARDING: The last exhibit, Your Honor, is
5 GX0007.000943-000 which is the complete PIQ associated with
6 Exhibit 16 discussed in the deposition of Dr. Lucas.

7 MR. FINCH: We do object to that one. May I approach
8 the podium, Your Honor?

9 THE COURT: Yes.

10 MR. FINCH: To state the basis.

11 THE COURT: May I see where this is first? This is
12 the last exhibit in the binder, the one that starts final cover
13 sheet?

14 MS. HARDING: Yes, Your Honor.

15 THE COURT: Okay, yes, Mr. Finch?

16 MR. FINCH: It's 0009430. There's a few other
17 documents in my binder, Ms. Harding, you're not intending to
18 offer those Exhibits 166 and 167?

19 MS. HARDING: That's right. We're just -- just the
20 ones I've listed.

21 MR. FINCH: Okay. As to Exhibit 7 a bunch of zeros,
22 9430, this is a personal injury questionnaire. We have two
23 bases for this objection. The first is a relevance objection,
24 the same objection that we made yesterday. We think, under the
25 governing law, the questionnaires are irrelevant to the

1 question of what was Grace's liability for costs it would incur
2 to resolve claims in the tort system.

3 The second objection is based on the fact that other
4 than the piece of the exhibit, which is what Dr. Lucas did
5 which he described in his testimony, everything else in here is
6 hearsay.

7 THE COURT: All right, one second.

8 (Pause)

9 THE COURT: All right, and why is this not hearsay?

10 MS. HARDING: Your Honor, the first reason we're
11 seeking to admit them, they are admissions of claimants in this
12 case --

13 THE COURT: Yes.

14 MS. HARDING: -- their medical records, their
15 statements about their medical condition. And they should be
16 admitted because they are their admissions.

17 THE COURT: They aren't at issue in this case. The
18 claimants are not defendants in this action. This is an
19 estimation proceeding.

20 MS. HARDING: But their medical conditions are at
21 issue in the estimation. Additionally, they are -- the medical
22 information -- the medical documents attached to the
23 questionnaire are -- should be admissible under the business
24 records exception.

25 THE COURT: These are not --

1 MS. HARDING: And they're also --

2 THE COURT: I understood it though, not Dr. Lucas'
3 medical records.

4 MS. HARDING: No, the medical record that was
5 discussed in the deposition is indeed Dr. Lucas' B-read of the
6 patient.

7 THE COURT: Yes, and that part I think is admissible.
8 He's testified --

9 MR. FINCH: I didn't object to the one piece of paper
10 that was Dr. Lucas'.

11 THE COURT: Correct.

12 MR. FINCH: What I objected to, Your Honor, is the
13 rest of the questionnaire. What I objected to, Your Honor, was
14 the rest of the questionnaire and the other documents attached
15 to it as to which -- the document's attached to it, there's no
16 foundation, business records of anybody. And the questionnaire
17 is hearsay.

18 And may I respond to the --

19 THE COURT: She's not finished yet.

20 MR. FINCH: Sure. Okay, fine.

21 MS. HARDING: No, I mean, it's the -- the PIQ is a
22 discovery response, Your Honor.

23 THE COURT: Yes, of a person who's not here. I mean
24 it's a discovery response of a claimant, not of the ACC and not
25 of the FCR.

1 MS. HARDING: Well --

2 UNIDENTIFIED ATTORNEY: Barb?

3 MS. HARDING: Hold on one second.

4 UNIDENTIFIED ATTORNEY: Okay.

5 MS. HARDING: Excuse me one second, I want to confer
6 with counsel.

7 (Off the record discussion)

8 MS. HARDING: Your Honor, I think as we've discussed
9 before with the Court, the claimants in this case are parties.
10 They have filed proof of claim forms. And they are parties to
11 the case -- to the estimation. We've -- they're under the
12 control of the ACC. They represent them. If we don't --

13 THE COURT: They clearly don't represent the parties
14 here.

15 MS. HARDING: Well --

16 THE COURT: The parties -- the individual claimants
17 are not parties to the estimation. Some of their information
18 is clearly relevant and it is the kind of information that
19 experts may use in the course of their work in terms of
20 estimating the liability. But, that doesn't mean that the
21 substantive work itself is admissible as a document upon which
22 this Court has any basis to admit the substantive evidence.
23 Just because the expert relies on it, doesn't mean that the
24 document itself is admissible. It's hearsay. Those parties --
25 these claimants are not parties to the estimation. Their

1 information is clearly relevant to what your experts wish to
2 do, but that doesn't mean that the information itself is not
3 hearsay. It is.

4 The experts are entitled to rely upon hearsay. The
5 rules clearly provide for that. And your witnesses have been
6 quite clear about the fact that medical information is clearly
7 of the nature that they would consider in the course of their
8 duties. But that doesn't mean that the information itself
9 isn't hearsay, it is, except for the findings that Dr. Lucas
10 himself has made. That clearly is a business record of Dr.
11 Lucas', and it is admissible.

12 So, Dr. Lucas' -- that one page that he identified,
13 that document is admissible and will be admitted. But I don't
14 see how the rest of the questionnaire itself is admissible.

15 MS. HARDING: Your Honor -- well --

16 MR. FINCH: Your Honor, what about the one counsel
17 per --

18 THE COURT: I'm going to ignore it for now, Mr.
19 Finch. Mr. Bernick, if you want to take a shot at this.

20 MR. BERNICK: Yes, I understand.

21 THE COURT: I'll give you a chance and I'll ignore
22 the one counsel rule for this purpose.

23 MR. BERNICK: I understand where I think Your Honor
24 is going. And obviously, the thrust of what I take Your Honor
25 to be saying is the PIQ information witness, what happened

1 yesterday and the like, is appropriate material for an expert
2 to rely on --

3 THE COURT: Yes.

4 MR. BERNICK: -- but doesn't have to come in
5 independently. And I appreciate that and I appreciate the fact
6 that we will be able to have the expert testimony come in from
7 that point of view.

8 But there are many aspects of the case where I think
9 it's going to be important to have the underlying information
10 be a matter of record. And I'm concerned that the -- if the
11 -- while it seems at this point that it may be that the
12 entirety of the case is expert opinion, I do believe that the
13 claimants -- the ACC itself will be proffering testimony indeed
14 through their own experts who they seek to make fact witnesses
15 regarding the underlying facts that pertain to these claims.

16 In this particular case, I don't --

17 THE COURT: Why won't that be hearsay?

18 MR. BERNICK: Yes, it may well be.

19 THE COURT: What's sauce for the goose is sauce for
20 the gander.

21 MR. BERNICK: I understand that. And what I -- but
22 I'm loathe to follow the path of least resistance and embrace
23 the fact that it may be least resistance also for the other
24 side under a circumstance where I think it's relatively clear
25 that this is not hearsay.

1 And I say that for two reasons. (1) I don't believe
2 that there is a separate case called the estimation case.
3 There is a proceeding in a trial called the estimation
4 proceeding and trial. The case is the bankruptcy case.

5 THE COURT: Well, sure.

6 MR. BERNICK: And these individuals are parties to
7 the bankruptcy case. They have made claims in the bankruptcy
8 case. Their counsel have filed 29 team statements appearing on
9 their behalf in the bankruptcy case. These are pleadings in
10 the bankruptcy case. They are all of them signed by the
11 claimants. I don't think it gets much better that they are
12 parties to the case. They may not be parties to this
13 proceeding, but they are part --

14 THE COURT: But you have to make them parties to the
15 proceeding, otherwise there's no due process right that
16 attaches.

17 MR. BERNICK: I don't -- the rule --

18 THE COURT: This is not an objection to claim
19 process. If you want them to be a party to a proceeding,
20 you've got to join them in some fashion to a proceeding.

21 MR. BERNICK: I don't believe that the rules have
22 anything to do with the distinction between different kinds of
23 proceedings within a case. If you are a party to the
24 bankruptcy case, you are a party for purposes of the rule on
25 admissions. These people are parties. It may be that they're

1 represented by the ACC and the FCR, but we're dealing very,
2 very strictly with the rule of evidence.

3 And the rule of evidence says, it's hearsay unless
4 it's a statement by a party. There's no distinction within
5 that exception -- actually, it's not even an exception to the
6 hearsay rule, it is non-hearsay under the Federal Rules of
7 Evidence if it's a statement made by a party. There's not a
8 distinction made under the Federal Rules of Evidence between a
9 party who participates in one proceeding as part of a case and
10 a party who does not participate.

11 Indeed, I think it's even conceivable that if the
12 claimants had wanted to, they've made the election not to
13 participate in this process, and they're represent -- their
14 interests are represented by the ACC and FCR. But I would
15 under -- I would imagine that if any claimant actually wanted
16 to participate in this case through counsel to express whatever
17 view they wanted as they have throughout the process, think of
18 all of the times the claimants' counsel have come before this
19 Court in connection with a discovery that was directly relevant
20 to and part of this estimation proceeding.

21 THE COURT: Sure. There is no doubt that if they
22 chose to be here, the Court would permit them to be here. I'll
23 take a brief from all parties on this issue. I'll reserve
24 ruling.

25 MR. BERNICK: Okay.

1 THE COURT: And this is what I'll do. To the extent
2 that it is somehow necessary until I get these briefs for
3 somebody to make reference to these documents, I'll permit it
4 subject to a motion to strike. This isn't a jury trial. I can
5 certainly discount this evidence later. It's not the first
6 time I will have seen these PIQs in the case anyway. So, I'm
7 certain that I can put it aside if I need to. So, I'll let you
8 make use of it. But I want briefs on this issue --

9 MR. BERNICK: That's fine.

10 THE COURT: -- because the Federal Rule of Evidence
11 in this instance does not really fit exactly with the type of
12 proceeding that we've got going.

13 MR. BERNICK: And I appreciate that. And that's
14 fine. And I think that that's fine. The only other two things
15 I'll just say and I'll sit down, so we can get on with things,
16 is that there was no objection made to this PIQ until like last
17 night. And I do remember very vividly and this is one of the
18 reasons that I wanted to stand up -- before we actually
19 embarked upon this trial, there was a lot of discussion about
20 how -- what would be involved in getting documents into
21 evidence. And it was very, very clear that we were not going
22 to have a situation where at the last minute objections would
23 be made; would then require that we go out and take somebody's
24 deposition or take evidence.

25 THE COURT: That's true.

1 MR. BERNICK: So, we have gone through this entire
2 process. And now we face a technical object that could be
3 resolved if we actually had to by going out and taking the
4 depositions of these doctors and actually going through the
5 business records exception, et cetera, et cetera. Or for that
6 matter, taking the depositions of the claimants because the
7 claimants could be deposed and they could be then asked to
8 verify what they submitted discovery on.

9 Instead, we get an objection that's made less than 12
10 hours before the appearance of this information. And it's an
11 objection that is a technical objection that could easily be
12 cured, and we can't cure it. And the last point is

13 THE COURT: I'll give you time to cure it if that's
14 the necessary issue.

15 MR. BERNICK: I hope it's not. Now, then the last
16 thing --

17 THE COURT: If it's a last minute objection --

18 MR. BERNICK: Because the other people that would be
19 able to do it are the law firms. And of course we went down
20 that road.

21 The last point is that -- as Ms. Harding indicated
22 -- that in the case of this last witness, there are literally
23 hundreds and indeed thousands of PIQs that identify these
24 people. In the case of Mr. Lucas, it's probably over 400
25 times. He was listed as the diagnosing, not presumptive or not

1 -- the diagnosing doctor. We want to be able to offer in a
2 very simple summary. Under 1006 that says, here's all the
3 times the PIQ said that.

4 I don't want to have to deal with, well, can a
5 summary be -- come in if it's a summary of information that's
6 not independently admissible but is information that would be
7 usable by an expert under 702, 703. Can you have a 1006
8 summary of evidence that's usable by an expert?

9 THE COURT: Yes.

10 MR. BERNICK: I hope so, but that's part of -- it's
11 kind of what I'm thinking about is that I'm very reluctant to
12 say we're it's so clear, it shouldn't be independently
13 admissible because it will come in through an expert. If we
14 can work that out, maybe that would also help this out. I
15 don't want to --

16 THE COURT: That one, I don't have any issue about
17 because I've had to rule on that issue before many years ago.
18 And I'm relatively sure that the case law will support the fact
19 that if the expert can use it, you can use the summary. This
20 witness was very clear that he himself is not a diagnosing
21 physician. And if somebody is treating him that way, it seems
22 to me that the PIQs or other information that list him as
23 diagnosing physician can be summarized to show that somebody
24 thinks he's a diagnosing physician when he himself is (a) not
25 forming a patient relationship from his point of view, and (b)

1 is not using himself as a diagnosing physician. And it doesn't
2 seem to me that it's inappropriate to use a summary for that
3 purpose.

4 MR. BERNICK: Okay. I appreciate that. And we will
5 be happy to submit a brief. I don't know, would Your Honor
6 like to have simultaneous briefs on the issue?

7 THE COURT: Yes, I think simultaneous briefs are
8 fine.

9 MR. BERNICK: Ten days or --

10 THE COURT: Or Mr. Finch -- it's Mr. Finch's
11 objection.

12 MR. FINCH: Sure.

13 THE COURT: If you want him to go first, he has to go
14 first.

15 MR. FINCH: Ten days from -- ten days from today.

16 MR. BERNICK: Ten days from today.

17 THE COURT: That's fine.

18 MR. FINCH: Simultaneous briefs of ten pages.

19 MR. BERNICK: Well, I hope it's not 10 or 15 pages.

20 THE COURT: I doubt they're going to find that many
21 cases. Ten pages ought to be fine.

22 MR. BERNICK: That's right.

23 MR. FINCH: I understand that. But can I respond
24 briefly about something Mr. Bernick said?

25 THE COURT: Yes.

1 MR. FINCH: Under the case management order that is
2 in place, January 4th, 2007 was the deadline for all parties
3 filing authenticity objections to exhibits and stipulations
4 regarding the admissibility of exhibits. This wasn't an
5 authenticity objection. This was a hearsay objection. There
6 is no deadline in the CMO to identify hearsay objections.
7 And --

8 THE COURT: Well, you've got one now.

9 MR. FINCH: Absolutely.

10 THE COURT: And it's ten days from now.

11 MR. FINCH: I understand that. But the second point
12 relating to the parties' issue. This is a contested matter
13 within the bankruptcy case. When your Court entered the order
14 scheduling the hearing, you said this was core proceeding
15 pursuant to 28 U.S.C 157(b)(2).

16 28 U.S.C 157(b)(2) makes clear that a core proceeding
17 includes but is not limited to the allowance or disallowance of
18 claims against the estate or exemptions of property of the
19 estate and estimation of claims or interest for the purposes of
20 confirming a plan under Chapter 11, 12, or 13 of Title 11, but
21 not the liquidation or estimation of contingent or unliquidated
22 personal injury tort or wrongful death claims against the
23 estate for purposes of distribution in a case under Title 11.

24 The individual circumstance -- the individual
25 claimants are not parties to a proceeding that would allow or

1 disallow their individual claims.

2 THE COURT: Right.

3 MR. FINCH: Therefore, I don't they're parties within
4 this contested proceeding in this bankruptcy within the meaning
5 of the Federal Rules of Evidence. If there was a contested
6 proceeding involving John Smith -- claimant Smith, Mr. Bernick
7 would have to file an objection to claimant Smith's claims.
8 And that would tee off a whole level of procedural rights that
9 that claim won't have the right to do, including discovery from
10 Grace. They would set a schedule in the district court to
11 identify experts for trial. And you would get a trial in front
12 of a jury. That's our basic position, Your Honor.

13 THE COURT: Well, I think I agree with that basic
14 position. That's why I'm going to have you give me briefs on
15 that issue and on whether or not these PIQs are hearsay within
16 the meaning of the Federal Rules of Evidence or whether or not
17 because the claimants are clearly parties to the bankruptcy
18 here, there's no doubt about that, that automatically makes
19 them parties to every proceeding regarding a plan confirmation
20 that they somehow or other deal with a claim that they may hold
21 in that bankruptcy. I don't think that's the way it's going to
22 come out, but it may.

23 MR. FINCH: Or for purposes solely of the question of
24 the usability of their statements as evidence.

25 THE COURT: Exactly. Yes. Just for purposes of

1 whether or not these statements are admissions against their
2 interest as the debtor is classifying this statement at the
3 moment. That's the purpose, yes.

4 MR. FINCH: Okay. We will file a brief. I'm not
5 sure whether ten days from today on a weekend.

6 UNIDENTIFIED ATTORNEY: It's a Saturday.

7 MR. FINCH: It does. So, what's the next day?

8 UNIDENTIFIED ATTORNEY: Friday, February 1.

9 THE COURT: Today is the 23rd, so --

10 MR. FINCH: Monday the 4th, would that be acceptable,
11 Your Honor?

12 THE COURT: Yes, that's fine because --

13 MS. HARDING: It's fine.

14 THE COURT: -- I mean, this issue is probably not
15 going to -- I think it -- we have until the end of this trial
16 until we need to know the result of this, although it would
17 probably be better to get it resolved before then if possible.
18 So, if --

19 MR. FINCH: Thank you, Your Honor. May we take a
20 short recess now for --

21 THE COURT: Yes, but I would like one -- to make one
22 statement before we start this. I think this process is going
23 to be helpful, but frankly, folks, that was an hour and a half
24 of testimony that could have been 45 minutes. There was an
25 awful lot of duplication. I know you probably think that I'm

1 not the brightest bulb on the planet, but I really don't need
2 to hear things three and four times. Once, and maybe twice
3 will do it. Please get the duplication out of this record. It
4 will expedite things an awful lot in the future.

5 MR. FINCH: Okay.

6 THE COURT: Once is generally satisfactory. Twice
7 will definitely be enough. And if I still don't ask it -- you
8 know I'm verbal enough. If I don't understand it by then, I'm
9 verbal enough, I'll ask.

10 MR. BERNICK: Yes, the problem is -- Ms. Harding may
11 have something to add -- is just the usual kind of designation,
12 counter-designation. I think that that probably created the
13 duplication. I was reading through. I think that that's where
14 it happened. It was in the, you know, the back and forth
15 process. And I think that what really is necessary is for us
16 to spend more time talking with one another so that we can
17 reduce the total amount of time.

18 THE COURT: I think so, too, because this estate is
19 paying for a lot of you to be here. And it's -- it's wholly
20 unnecessary. And if a witness were on the stand, I would not
21 permit the same question and the same answer to be asked five
22 and six times. I would not do it, and I'm not going to do it
23 again in these -- after today because I understand that you had
24 to go through this process last night. But those are your
25 marching orders for the rest of these depositions. One time

1 through fine. If for some reason, somebody thinks the question
2 or the answer wasn't clear, okay, twice, fine. And once on
3 cross examination, that's three times. If all of us can't get
4 it after three times, we don't deserve to be here. And if I
5 still don't understand, as I said, I'll ask. But no more than
6 twice on direct, once on cross, that's it. Please, get it out.
7 Get all the duplication out. And then I don't think we'll have
8 to be here quite so long for this purpose.

9 Okay, we'll take a ten minute recess.

10 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

11 (Recess)

12 THE COURT: Please be seated. Ms. Harding, are there
13 other exhibits?

14 MS. HARDING: No further exhibits with Dr. Lucas,
15 Your Honor.

16 THE COURT: Yes, okay.

17 MR. FINCH: Just one point of clarification? Your
18 Honor, one point of clarification. On February 4th, it was my
19 understanding that the parties would exchange their file briefs
20 on the issue of the admissibility of that particular
21 questionnaire and the extent to which questionnaire responses
22 would be treated as admissions of parties for purposes of this
23 case.

24 THE COURT: Correct.

25 MR. FINCH: What was not clear to me is whether or

1 not the Court also wanted the parties to exchange any
2 objections to exhibits beyond authenticity? The CMO did not
3 require that. It's oftentimes hard to know whether you have a
4 substantive objection to some exhibit until you see the purpose
5 for which it's being offered.

6 THE COURT: Well, you may not know about relevance
7 objections, but you certainly know about hearsay objections.
8 So, I think if you got hearsay objections, you ought to be
9 making those. So, we can deal with those in advance because
10 for the most part, those are going to be legal issues that
11 ought to be able to be briefed in advance. Relevancy can't
12 -- I can't give you rulings about relevance until I know the
13 context. So --

14 MR. FINCH: So, we have a relevance objection,
15 obviously, to all the questionnaires. But for hearsay
16 purposes, you would have to assume that every document on the
17 other side's exhibit list is being offered for the truth of the
18 matter when in fact they may not be doing that. So, would you
19 rather me just assume that all of the documents they're
20 offering are for truth and object on hearsay grounds if I think
21 it's hearsay?

22 THE COURT: You've been through two and half years of
23 discovery and you don't know at this point and time whether the
24 documents are going to be offered for the truth, or is
25 demonstrative exhibits, or whatever else is going to happen?

1 MR. FINCH: Not necessarily, Your Honor, until you
2 see how the witness is approached with the document and the
3 purpose for which it's offered.

4 THE COURT: Then you need to meet and confer. So, I
5 think you folks need to meet and confer with respect to your
6 documents.

7 MR. BERNICK: Your Honor? Your Honor said on the
8 record, and appropriately so, that this should be -- these
9 objections should be made so we can get immediately to the
10 question of what needs to be done to cure these if they are
11 proper -- which we doubt that they are -- technical objections.
12 There's not -- I don't -- I'm happy to meet and confer, but I
13 don't think that should have the effect of deferring the
14 deadline for making the objections.

15 MR. FINCH: That's fine.

16 MR. BERNICK: We can -- excuse me -- so we that we
17 can get on with business. You know there are many courts in
18 which you are required to make all objections before the trial
19 even begins.

20 THE COURT: That's normally my practice.

21 MR. BERNICK: And Your Honor has been flexible about
22 that. So, this is not a particularly big deal. We'll meet and
23 confer. But I think that, what did Your Honor say, by February
24 14th, we should have -- something like that -- was it February
25 14th?

1 THE COURT: Well, I said the 4th, but when -- I think
2 maybe the best thing to do in thinking about this is, you've
3 got an omnibus date sometime in February. I don't know when
4 that is. Does anybody --

5 UNIDENTIFIED ATTORNEY: 25th.

6 THE COURT: Oh, that might be a little late.

7 MR. BERNICK: Yes, the difficulty, Your Honor, is
8 that we are on a hiatus. But time is not on our side if we're
9 going to have to figure out some way to deal with these hearsay
10 objections. They've got maybe a thousand exhibits. It's not
11 particularly difficult if they want to really lodge a hearsay
12 objection to go ahead and lodge it. And I think that while we
13 can meet and confer and all the rest of that, we should know
14 what their objections are particularly in areas other than
15 relevance. I understand they're going to object to everything
16 that we do on relevance grounds. That's been established.

17 But when it comes to hearsay and other things that we
18 can cure, I think that Your Honor ought to set a deadline. If
19 it's February 15, it's February 15. And both sides will just
20 -- will go through and make the draws. It's not rocket
21 science.

22 THE COURT: Well --

23 MR. FINCH: That's perfectly acceptable to us, Your
24 Honor, if we just have a deadline of February 14th or --

25 THE COURT: Well, I had originally said the 4th, but

1 perhaps what I was going to say is -- maybe the 14th is a
2 weekday, too. What I was going to suggest is maybe a date that
3 is in advance of the next omnibus date in February makes sense
4 so that we can address any objections at that omnibus and not
5 take up a trial date for it. Your omnibus date seemed to not
6 be being used for a lot of matters, so maybe we could address
7 objections at the omnibus.

8 MS. HARDING: I'm told it's the 25th, Your Honor,
9 February 25th.

10 MR. BERNICK: And so if we agreed to say the 15th or
11 something like that, would --

12 MR. FINCH: That's fine.

13 MR. BERNICK: Yes, so, we'll do --

14 THE COURT: All right, wait, let me check my
15 calendar.

16 MR. BERNICK: The 15th is the date to exchange the
17 subject objections --

18 MR. FINCH: Yes.

19 MR. BERNICK: -- other than relevance.

20 THE COURT: Well, let me check my calendar.

21 MR. BERNICK: Okay.

22 THE COURT: The 15th, I think, is going to be the day
23 that the agenda will be due because that's the Friday before
24 the 25th. So, I think you actually need to exchange them the
25 14th so that the could be included in the binder on the 15th.

1 MR. FINCH: That's fine. We'll exchange the
2 objections to each other's exhibits lists on the February 14th.
3 And the briefs that we're talking about on the hearsay issue,
4 we will file with the Court on February the 4th.

5 THE COURT: Yes.

6 MR. BERNICK: Right.

7 MR. FINCH: Okay. Thank you, Your Honor.

8 (Pause)

9 THE COURT: One second. Okay, I'm with you again.
10 Thank you.

11 MS. HARDING: Thank you, Your Honor. I'd just like
12 to give you just a preview of what's coming so you know for
13 your scheduling purposes.

14 THE COURT: Right.

15 MS. HARDING: We've got Dr. Gaziano who is nearly an
16 hour. There's about 25 minutes from us and about 33 from the
17 other side. Dr. Oaks, which is about 47 minutes. Mr. Heath
18 Mason is about eight minutes. Mr. Charley Foster is about
19 eight minutes. James Ballard is about ten minutes. Ray Harron
20 is about ten minutes. And then we have the one transcript
21 which is not on video, which is the one we were going to read,
22 which -- I don't know if Your Honor wants us do that or not,
23 but that one is a physical document. And that will take about
24 an hour, we timed it trying to do the reading as fast as we
25 could. And that's about an hour.

1 THE COURT: All right.

2 MS. HARDING: Okay? All right. So, the next doctor
3 is Dr. Gaziano on Exhibit GG2094, Dr. Henry's chart. He is
4 listed the third doctor down on Dr. Henry's chart.

5 THE COURT: All right.

6 MS. HARDING: Okay? Thank you.

7 (Videotaped deposition of Dr. Gaziano played into the record)

8 THE COURT: I'm sorry, can you back up? It's
9 starting to go too fast and I can't get the questions. Just to
10 the last -- whatever the last question was.

11 (Videotaped deposition of Dr. Gaziano played into the record)

12 THE COURT: Now, I can't understand it.

13 UNIDENTIFIED SPEAKER: No, no. She couldn't
14 understand that. Is that the best the sound is?

15 UNIDENTIFIED SPEAKER: That's what it is.

16 UNIDENTIFIED SPEAKER: Okay, would it be helpful for
17 us to just to read the question for Your Honor?

18 THE COURT: It may be because it's so verbal that I
19 can't pick it up. And on top of that, whoever is asking is now
20 going like a house on fire and so it's -- on top of getting it
21 garbled, I just can't pick the words out.

22 MR. BERNICK: Well, the last question that was
23 garbled is at Line 147 -- excuse me -- Page 147, Line 6.

24 "Q Are you aware that the ATS Guidelines indicate that
25 differential diagnosis is an important criteria for

1 non-malignant asbestos disease?"

2 And there then follows, Your Honor, the -- what's now
3 going to be a relatively long answer from the witness.

4 THE COURT: All right, well, we can try it and see if
5 I can get it from there.

6 MR. BERNICK: He -- go ahead.

7 (Videotaped deposition of Dr. Gaziano played into the record)

8 MR. BERNICK: I think that it was, Your Honor, at
9 Line 4, Page 187, "Would you agree -- well, do you believe that
10 an occupational title is sufficient to determine whether a
11 person was sufficiently exposed to asbestos containing products
12 to cause non-malignant asbestos-related disease" if you missed
13 the question.

14 : THE COURT: All right.

15 MR. BERNICK: If you can try to pick up, T.J. Wait,
16 187, Line 9.

17 (Videotaped deposition of Dr. Gaziano played into the record)

18 MR. BERNICK: Could you stop?

19 MR. BERNICK: I'm sorry, Your Honor, that was kind of
20 garbled, do you want me to read --

21 THE COURT: No, I got it.

22 MR. BERNICK: Okay.

23 THE COURT: Thank you.

24 (Videotaped deposition of Dr. Gaziano played into the record)

25 THE COURT: Now, I can't understand the tape.

1 MR. BERNICK: Yes, that is Page 249, Line 13. We are
2 getting towards the end here, Your Honor. "I think this
3 morning, it may have been this morning before the lunch break,
4 I believe you testified in the course of answering another
5 question that you do not -- I believe your testimony was that
6 you do not need an occupational history to make a diagnosis of
7 asbestosis in certain venues. Do you recall that testimony?"
8 And then we would pick up at Page 249, Line 20.

9 (Videotaped deposition of Dr. Gaziano played into the record)

10 MR. BERNICK: Okay, it says -- stop. "In fairness,
11 that was -- so it is your testimony that you do need an
12 occupational history in order to make a diagnosis of
13 asbestosis."

14 And the answer was at Line 7 of Page 250, "Yes,
15 ma'am."

16 So, why don't you pick up at 250 Line 18?

17 (Videotaped deposition of Dr. Gaziano played into the record)

18 MR. BERNICK: Your Honor, would you just like me to
19 read it?

20 THE COURT: No, I got it.

21 (Videotaped deposition of Dr. Gaziano played into the record)

22 THE COURT: Do we have to do this, again? This is
23 like 18 times through this. Stop this please, so we can back
24 it up. Folks, this is at least the sixth witness now who had
25 been through the ILO standards. I really don't want to hear it

1 any more.

2 MR. BERNICK: Well, you're looking over here, Your
3 Honor, that's not --

4 THE COURT: I'm looking at whoever. I do not want to
5 hear another witness go through what the ILO standards are,
6 what they have to do, you know, how they've been prepared, what
7 they're for, or the ATS standards and guidelines. I've got it.
8 I can probably quote it from any of the other witnesses that
9 you intend at this point to present. So, I don't want to hear
10 any more witnesses about that point unless they're going to say
11 something different from what the prior six have already told
12 me. If what you want to do is summarize for me something like,
13 and I'm just going to make this up, just simply for
14 illustrative purposes, Henry Anderson, James Ballard and James
15 Scutero, all say at Page 86 of their depositions that the ILO
16 standards say X, Y, Z, I will accept that as a summary chart, I
17 do not want to hear one more witness say this. It is
18 cumulative, I understand it, I believe them all. I do not want
19 to hear more witnesses about it. Okay. I will finish with
20 this witness, no more. Back it up to the beginning of Page --

21 MS. HARDING: I think it was the end, Your Honor.

22 THE COURT: -- back it up to the beginning of Page,
23 let's say the middle of Page 269, where I asked whether I had
24 to go through this again.

25 MR. BERNICK: It's actually 269, line 22.

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1 THE COURT: Thank you.

2 (Deposition played into record)

3 MS. HARDING: Your Honor, the Debtors offer GX-0196
4 and I believe Mr. Finch has already said there's no objection,
5 but I'll confirm that.

6 THE COURT: One second, please. 0196.

7 MR. FINCH: We have no objection to Grace Exhibit
8 196.

9 THE COURT: All right, it's admitted.

10 MS. HARDING: Thank you, Your Honor. We are, in
11 light of Your Honor's comments, kind of reviewing things. We
12 are not going to offer Dr. Oaks testimony today. I think it
13 will be cumulative. And we've got the testimony from the
14 witnesses that took the 5th Amendment, which is much shorter.
15 And then we have the one transcript which is a reading of the
16 transcript which I suggested maybe over lunch -- we have 20
17 minutes, they have 40 minutes. We'll try to cut ours down even
18 further and maybe the ACC can do the same with theirs.

19 THE COURT: All right. Do you want to take a lunch
20 recess now or do you want to go forward with the couple of
21 witnesses with respect to the 5th Amendment?

22 MR. BERNICK: I suppose it really -- we should just
23 take the break and then we'll be able to finish it up. On the
24 witnesses as to whom -- as to which their testimony the take
25 the 5th Amendment, our approach is to have just a couple, a

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1 clip of each one because they're going to say the same thing
2 over again. The reason that we have, then, more significant
3 transcripts and we would propose that those not be read because
4 they are simply the same invocations, but the reason that we
5 need them is that there are a whole series of questions and
6 we've tried to limit them, but there are a series of questions
7 as to which the 5th Amendment is taken and that we will seek an
8 adverse inference with respect to those. So that's the reason
9 why the transcripts are longer than the little clips, unless
10 Your Honor wants to hear those transcripts read. What we would
11 propose is that we simply play the clips and then tender the
12 transcripts and we can make a record of what portion of the
13 transcripts we're tendering so that Your Honor then can have
14 that as part of the record.

15 THE COURT: I think that's fine. I don't see if
16 they're going to say -- they're going to assert the 5th
17 Amendment as to each question, I don't see the need to ask each
18 question, and just have the witness assert the 5th, unless,
19 counsel, you see some reason to do that. That seems not to be
20 a productive use of anybody's time. All right, there's no
21 objection to that process. So, that's fine.

22 MR. BERNICK: We'll get that all arranged and maybe
23 that'll mean that our session after lunch is not all that long.

24 THE COURT: All right. Okay, we'll take an hour?

25 MS. HARDING: Thank you, Your Honor.

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1 THE COURT: All right, 1:30 we'll recess until 1:30.

2 MR. BERNICK: Thank you, Your Honor.

3 (Luncheon recess)

4 THE COURT: Please be seated. Ms. Harding.

5 MS. HARDING: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MS. HARDING: We're going to proceed as follows.

8 We've met and conferred with counsel and with respect to Dr.
9 Levine, we have reduced our designations from 25 questions to 7
10 questions, the ACC has reduced theirs from 40 to 28, I think.
11 I'm going to read our questions, my colleague Mr. Mendelson is
12 going to be Dr. Levine on the stand and answer the questions
13 both for me and Mr. Finch.

14 THE COURT: All right.

15 MS. HARDING: Okay. Dr. Levine, agreed through
16 counsel to respond to a subpoena by answering through
17 deposition by written question.

18 THE COURT: All right.

19 MS. HARDING: Thank you. May I sit at the table?

20 THE COURT: Sure. Just make sure you speak into the
21 microphone so I can hear you.

22 MS. HARDING: I will, okay. And I think we need
23 about one minute to just --

24 THE COURT: Okay.

25 MS. HARDING: -- took the last minutes to kind of get

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1 -- take off the questions for everybody, so it'll take us one
2 minute.

3 THE COURT: Okay.

4 MR. FINCH: Your Honor, is it acceptable to the Court
5 if I read the questions from here, rather than ping ponging
6 with Ms. Harding going back and forth to the podium?

7 THE COURT: Yes, that's fine. Dr. Levine.

8 MS. HARDING: Your Honor, this is my partner, David
9 Mendelson. Your Honor, we're going to start, there was a
10 general statement in the beginning, if you could read that,
11 please.

12 MR. MENDELSON: Sure.

13 THE COURT: First of all, what's Dr. Levine's first
14 name, please?

15 MR. MENDELSON: Richard B. Levine.

16 THE COURT: All right, thank you.

17 MR. MENDELSON: "Pursuant to Federal Rule of Civil
18 Procedure 31(a), non-party, Richard B. Levine provides the
19 following answers to written questions submitted by Debtor,
20 W.R. Grace and Company. General statement of Richard B.
21 Levine, M.D. According to generally accepted medical
22 principles, a positive B-read simply does not equate to a
23 clinical diagnosis of an occupational dust disease. To render
24 medical diagnoses that are conclusive, much more than a B-read
25 is required. The B-reader interprets densities or shadows on

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1 the chest x-ray. The densities or shadows can be caused by any
2 number of disease processes and may not indicate a disease
3 process at all. Reading shadows is subjective and
4 non-conclusive. Moreover, the B-reader system was not
5 established either as a clinical diagnostic tool or for use in
6 litigation, but rather as one part of a general surveillance
7 program implemented in Great Britain to determine whether coal
8 workers should be transferred to lower dust environments.

9 Finally, the B-read is a radiologists impression
10 based upon comparisons to the International Labor Organization
11 classification system. The ILO system was primarily devised to
12 have standards against which epidemiologic research and
13 analysis could be accomplished across the borders of many
14 nations. The guidelines, but their own terms, are not designed
15 for or intended to be used to clinically diagnose the presence
16 or absence of an occupational dust disease. Yet, apparently
17 certain persons are equating B-reads with clinical diagnoses of
18 occupational dust diseases including asbestosis. Certain
19 persons are apparently using my B-reads for that purpose. Such
20 use is bad science and unauthorized by me. Such use has
21 resulted in my having to defend the integrity of my B-reads
22 only because certain people have misused my B-reads for
23 purposes for which they were never intended by me or the ILO or
24 NIOSH, evidence of a political diagnosis of occupational dust
25 disease.

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1 I resent having to expend my resources responding to
2 claims I have never made, and would have disavowed if asked. A
3 B-read is not a clinical diagnosis of the presence or absence
4 of an occupational dust disease. I am a board certified
5 radiologist, and have been so since 1974. I am a NIOSH
6 certified B-reader and have been since 1985. I take my
7 responsibilities as a NIOSH certified B-reader quite seriously.

8 For example, within the last several months, I have
9 bene asked to and have provided services to prosecuting
10 attorneys and their agencies investigating alleged misuses and
11 abuses of B-reads in connection with occupational dust
12 diseases.

13 My areas of expertise and practice as a radiologist
14 extend to nuclear medicine, mammography, and diagnostic
15 radiology imaging, as well as occupational dust disorders as a
16 B-reader. I've practiced my radiologic specialty as a NIOSH
17 certified B-reader by interpreting x-rays for findings
18 consistent or inconsistent with previous occupational exposure
19 to dust. My interpretation is based upon my training as a
20 radiologist and my certification.

21 During the past several years I spent approximately 5
22 to 10 percent of my practice time as a B-reader, reviewing
23 x-rays for the presence or absence of occupational dust
24 diseases and writing reports based upon my observations. The
25 larger portion of that percentage of my time reviewing x-rays

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1 has been expended in reviewing them for the presence or absence
2 of findings consistent with previous occupational exposure to
3 asbestos.

4 My role is limited to performing a screening triage
5 function. The screening helps determine whether a work
6 environment may be in need of upgrading or whether an
7 individual should undergo a complete clinical examination by a
8 pulmonologist or other qualified physician, without which no
9 conclusive diagnosis of any occupational dust disease can be
10 made. I am not so qualified.

11 On many occasions, I have received x-rays sent from
12 imaging companies, unions, law firms, or even manufacturers of
13 asbestos products for my review within areas of my
14 specialization. Undoubtedly, many of the x-rays sent to me for
15 my review from each of these sources sought my opinion as a
16 NIOSH certified B-reader as to whether my findings were
17 consistent or inconsistent with previous occupational exposures
18 to dust. On receiving these x-rays I rarely know that any of
19 my reads are intended to be used in connection with litigation
20 much less whether the reports are to be utilized by plaintiffs
21 or defendants, should litigation ensue. The only exception
22 occurs if a law firm sends me a series of x-rays taken over a
23 period of years, of the lungs of a person who is by then more
24 often than not deceased. In such circumstances, I am often
25 asked to opine on whether the series of x-rays disclose the

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1 existence and progression of dust caused disease process and/or
2 cancer.

3 In those circumstances, I function as a board
4 certified radiologist and not limited to performing a B-read
5 function. In those circumstances, I do assume that any B-read
6 report included within my work, is sought along with the
7 reports of other specialists to enable the law firm to
8 determine whether the death is related to an occupational dust
9 disease.

10 I would expect that were my B-read report
11 inconsistent with occupational dust disease, no litigation
12 would ensue because that person as a plaintiff, based in whole
13 or in part on my report. Were my B-read report consistent with
14 such disease, then I would expect that person would undergo
15 whatever test and examinations are necessary to enable a
16 qualified physician to make a clinical diagnosis of the
17 presence or absence of such disease. Regardless of whether the
18 report had been sought by a union, or manufacturer or law firm
19 or imaging company, I expect there should be a clinical
20 diagnosis of occupational dust disease to support any such
21 claims. My triage function does not provide such a diagnosis
22 nor am I trained to make such a clinical diagnosis or to treat
23 persons with such diseases. None of my reports are intended to
24 and none can be used as a sole evidence of the presence or
25 absence of any occupational dust disease. No such diagnosis

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1 can be made from a B-read, regardless of the skill or expertise
2 of the B-reader.

3 Should a report regarding any specific x-ray conclude
4 that there are observations consistent with such prior
5 exposure, the presence or absence of such a disease can only be
6 established after a full examination and history by a
7 pulmonologist or other appropriate specialist.

8 My findings are intended to, and do serve a triage
9 function enabling the person or entity sending the x-ray to me
10 to obtain my radiologic impression so that such persons can
11 direct the individuals whose x-rays I reviewed to a
12 pulmonologist or other specialist for procedures necessary to
13 make the clinical diagnosis. Should -- lower lung bilateral
14 interstitial fibrosis with irregular linear interstitial
15 markings delineated and/or fertile thickening are other
16 indications consistent with asbestosis or make findings
17 consistent with some other occupational dust disease.

18 Any person who reports to rely upon my B-reading or
19 results in a report, as a clinical diagnosis of asbestos or
20 silicosis, is wrong as a matter of science and does so without
21 my authorization.

22 As a NIOSH certified B-reader, I have been asked to
23 review chest x-rays to determine whether they suggest a
24 presence or absence of occupational dust diseases. Such
25 diseases are not limited to asbestosis, or silicosis. To the

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1 contrary, they include a coal workers pneumoconiosis, heavy
2 metal disease caused by a vanadium laid in alloys or
3 berylliosis, among others.

4 Intriguingly, based upon x-rays, radiologic
5 impression are not necessarily limited to suggestions of only
6 one occupational dust disease. For example, coal workers
7 pneumoconiosis and silicosis may show similar x-ray changes,
8 thus it is simply bad science to make the clinical diagnosis of
9 occupational dust disease such as asbestosis or silicosis,
10 based upon a radiologic impression only. After all, the
11 radiologic impression may well be indicative of one or even two
12 dust diseases, or no occupational dust disease whatsoever.

13 Moreover, even if a radiologic impression does not
14 disclose suggestions of an occupational dust disease, the
15 person may well have such disease.

16 Finally, even if a radiologic impression does present
17 suggestions of an occupational dust disease, the person may
18 well have no such disease. On being asked to review chest
19 x-rays as a B-reader, rarely do I know if litigation is
20 contemplated or underway, as I am reading the x-rays. However,
21 I will assume that when asked by, for example, Johns Manville
22 to review x-rays, as I was during the 1990's, my reviews would
23 likely be for the defense side were litigation to ensue or to
24 enable Johns Manville to investigate the workplaces in which
25 persons whose x-rays I reviewed had worked or were working. If

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1 others sent x-rays for me to read, it could be that my reports
2 would be utilized to facilitate the screening of persons who
3 would be plaintiffs or companies in opposition to plaintiffs
4 whose x-rays had been reviewed by other B-readers or for other
5 reasons unrelated to litigation.

6 My role, however, is limited to the screening triage
7 function. My role is reflected in my form contract, a copy of
8 which is attached hereto as Exhibit 1. That contract states
9 that my B-reader service is restricted to "my opinion whether
10 the chest x-rays are consistent or inconsistent with previous
11 exposure to occupational dust". I do not need occupational
12 histories or durations and quantities of potential dust
13 exposures to perform my contract.

14 Moreover, since I am not purporting to render a
15 diagnosis under HCS guidelines, I need not obtain such
16 information nor need I refer to it even if it is sent to me.
17 The contract specifies that my B-reader report or ILO report is
18 not a clinical diagnosis of the presence or absence of any
19 occupational disease or condition and moreover, that no such
20 disease or condition can be diagnosed simply by a B-read. This
21 specification is simply good science.

22 My contract also recites that the presence" -- excuse
23 me. That the presence -- I'm sorry, my copy is missing a Page
24 7.

25 MS. HARDING: That may be because -- is it not

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1 designated?

2 MR. MENDELSON: I don't think that --

3 UNIDENTIFIED MALE SPEAKER: I don't think there was
4 anything designated on Page 7.

5 MS. HARDING: I think that's probably why. I don't
6 think anybody designated anything from 7.

7 MR. MENDELSON: All right. Picking up on Page 8, the
8 paragraph "I have never made a clinical diagnosis of silicosis
9 or asbestosis. If any person used by B-read report to do so,
10 it was without my knowledge and contrary to the contract,
11 pursuant to which I've served as a B-reader.

12 The restrictions and limitations upon the B-read
13 which I have made as part of my practice are not only
14 consistent with, but compelled by the inherent limitations and
15 restrictions imposed by science upon the use and functions of
16 B-reads and ILO reports.

17 MS. HARDING: Okay. So, I guess the last paragraph
18 is not designated, that's why. All right. Could you --

19 "Q What is Dr. Levine's education background?

20 "A I received my BA cum laude in Biology from
21 Hofstra College in June of 1965. I received my MD degree from
22 Albert Einstein College of Medicine in June of 1969. I
23 interned in medicine at Colorado General Hospital of the
24 University of Colorado and Denver, Colorado and did my
25 residency in radiology with a specialization in nuclear

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1 medicine at the Montefiore Hospital in the Bronx, New York.
2 See my CV attached hereto as Exhibit 2 for additional
3 information."

4 MS. HARDING: Mr. Mendelson, just a reminder because
5 I know that with respect to some answers, only certain portions
6 are designated. So, just -- it's fine, it's not a big deal
7 here, but I think later the ACC has designated just certain
8 portions.

9 Question Number 3 "What are Dr. Levine's professional
10 certifications, if any?

11 "A I was certified by the American Board of
12 Radiology and Diagnostic Radiology and Nuclear Medicine in
13 1974. I obtained my NIOSH ILO B certification in 1985 and have
14 been recertified in 1989, 1993, 1995, 2001 and 2005. See my CV
15 attached hereto as Exhibit 2."

16 Question Number 6: "Has Dr. Levine's B-reader
17 certification ever been revoked, and if so, please explain the
18 circumstances?

19 "A No.

20 Question Number 22: "In his non-hospital based
21 B-reading practice approximately how many x-rays has Dr. Levine
22 found to be positive for the presence of an asbestos related
23 disease? Please express answer both as a total volume number
24 and as a percentage of Dr. Levine's total non-hospital based
25 B-reading practice?

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1 "A I incorporate my general statement, my contract
2 template and my response to written deposition question number
3 21 as if fully set forth. I have note ever attempted to break
4 down the percentages of positive or negative radiologic
5 impressions, or by non-hospital B-reading and practice by
6 occupational dust disease. Be it asbestos related, silicosis
7 related, berylliosis, coal workers pneumoconiosis or another
8 dust. The best that I can recall is that of the x-rays sent to
9 me for the application of my skills as a NIOSH certified
10 B-reader and regardless of whether the x-rays has been
11 submitted to me by persons on the 'claimant' side, or the
12 'defendant' side, of these self-selected groups of persons
13 x-rayed, I am comfortable estimating that I generally find
14 radiologic impressions consistent with occupational dust
15 disease between 15 to 24 percent of the time. This figure is
16 in excess of what I would expect to find in the general
17 population. It does not seem to me to be surprisingly high or
18 low in view of the likelihood that many x-rays provided to me
19 for B-reads are of chests of people more likely to have lung
20 disclosing radiologic indications consistent with occupational
21 dust diseases.

22 Question Number 23: "How much does Dr. Levine charge
23 per x-ray reviewed as part of his non-hospital based B-reading
24 practice? If there is a variation in the amounts Dr. Levine
25 charges for such services, please explain the response in

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1 detail.

2 "A I have no set rate per x-ray reviewed as part of
3 my non-hospital based B-reading practice as you have defined
4 it. If the provider of the x-rays seeks a B-read narrative
5 report, but not an ILO report, the charge is generally less per
6 person than for the B-read narrative and the ILO report. If a
7 provider sends only one view, my charges are less than for two
8 views or four views. My charges increase as the number of view
9 increase. For certain persons who have been submitting x-rays
10 for my review for mane years, I may charge less per x-ray
11 review than those who are new sources. My current charge per
12 x-ray as part of my non-hospital based B-reading practice as
13 you have defined it, is in the range of \$10 to \$45.

14 Question Number 24: "Does Dr. Levine's compensation
15 for reviewing x-rays as part of his non-hospital based
16 B-reading practice vary depending on the results of his review?

17 "A No, nor has it ever. I resent having to respond
18 to this question.

19 Question Number 25: "Has Dr. Levine ever been paid
20 more for rendering a finding that an x-ray is positive for or
21 consistent with an occupational dust disease? If so, please
22 explain the circumstances.

23 "A No, I resent having to respond to this question.

24 Question Number 26: "Since the first year that he
25 began his non-hospital based B-reading practice, how much of

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1 Dr. Levine's annual income, per year, is attributable to the
2 x-ray readings he performs as part of his non-hospital based
3 B-reading practice?

4 "A I am unable to answer written deposition
5 question number 26 because I have never thought of my practice
6 as the compartmentalized structure that you have posed nor can
7 I possibly provide a responsible answer given the two plus
8 decades within which I have reviewed x-rays as NIOSH certified
9 B-reader. My non-hospital based B-reading practice, as you
10 defined it, is a portion of my nuclear medicine, mammography
11 and diagnostic radiology imaging practice. What I can
12 represent with some degree of confidence, is that for the last
13 several years I've expended approximately 5 to 10 percent of my
14 practice time as a B-reader.

15 Question Number 47: "Did Dr. Levine ever discuss
16 with any lawyer, law firm or claimants firm methods to develop
17 screening practices that would cause a high percentage of the
18 individuals screened to be found positive for an asbestos
19 related disease?

20 "A No, I resent being asked this question. By way
21 of further answer, I have never discussed with any person or
22 entity, methods of developing screening practices, much less
23 the methods that would cause high percentages of individual
24 screens to be found positive for any disease, including an
25 asbestos related disease.

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1 Question 68: "And, did Dr. Levine ever place any
2 restrictions on the use his B-reads, or B-reading reports
3 generated as a result of his non-hospital based B-reading
4 practice and if so, please identify all such restrictions.

5 "Yes. See my general statement above. I perform
6 B-reads only after a contract has been entered into. A
7 template of my contract is attached hereto as Exhibit 1. The
8 contract specifies that no ILO or B-read report is a clinical
9 diagnosis of the presence or absence of any occupational dust
10 disease or condition. That no such condition can be diagnosed
11 simply by a B-read, That the presence or absence of such a
12 disease any only be established after a full clinical
13 examination and history undertaken by a pulmonologist or other
14 specialist. That my reports are not intended to and cannot be
15 used as the sole evidence of the presence or absence of an
16 occupational dust disease. The person seeking my radiologic
17 diagnostic impression should utilize my ILO, or B-read reports
18 in order to determine who should be directed to a pulmonologist
19 or other specialist, or alone qualified to make a clinical
20 diagnosis.

21 Prior to my requiring a written contract and during
22 the applicable time frame set forth by your definitions, I
23 provided by B-read services subject to similar conditions,
24 limitations and restrictions, based upon all contracts with the
25 source requesting my application of my expertise as a B-reader.

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1 Question Number 71: "Is Dr. Levine aware that he was
2 named as a diagnosis doctor by law firms in response to the
3 W.R. Grace asbestos personal injury questionnaire? See
4 attached Exhibit A which is a composite exhibit of
5 representative W.R. Grace asbestos personal injury
6 questionnaire responses?

7 "A Not until being informed by W.G. Grace's
8 counsel. I incorporate my general statement above. I do not
9 know the definition of diagnosis doctor on the questionnaire.
10 I would expect that no person listing me as their diagnosing
11 doctor was purporting to represent that I had made a clinical
12 diagnosis. Such a representation, based only upon my B-read is
13 both bad science and beyond my contract.

14 By way of further response, I have no present
15 recollection of ever having authorized any lawyer to identify
16 me as the diagnosing doctor in response to a W.R. Grace
17 personal injury questionnaire, nor did I ever know that there
18 were such questionnaires until being contacted by W.R. Grace
19 counsel.

20 Most importantly, I have never made such a clinical
21 diagnosis of asbestosis or any asbestos related disease or of
22 any occupational dust disease. I would assume that some of the
23 lawyers or law firms had contracted directly with me for my
24 services as a B-reader, but I believe that many did not. Had
25 they so contracted with me, they could not reference me as a

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1 diagnosing doctor without breaching their contact with me,
2 unless they have intended to mean that my B-reading impression
3 was limited to a radiologic diagnosis, and that at some
4 appropriate time a clinical diagnosis would be provided by
5 someone other than me.

6 I assume many of the lawyers and law firms have never
7 sought my services as a B-reader. I have no idea why my B-read
8 round up with such a firm --"

9 MS. HARDING: I'm sorry, actually can you start over
10 there, I think you misread -- start with I assume.

11 "I assume many of the lawyers and law firms have
12 never sought my services as a B-reader. I have no idea how by
13 B-reader wound up with each such firm or why such firm was not
14 provided with the terms and conditions of my B-read contract.
15 Regardless, I am not a diagnosis doctor as you have defined
16 that term because I've acted only as a B-reader of x-rays and
17 therefore, can and have recited only my radiologic diagnostic
18 impression and not made a clinical diagnosis.

19 Question Number 73, and I think the first part of the
20 answer is the only -- the first paragraph is the only part
21 that's designated by either party right now. "In your opinion,
22 is the use of your name or x-ray reports in this matter, see
23 attached Exhibit A which is a composite exhibit of
24 representative W.R. Grace asbestos personal injury
25 questionnaire responses, appropriate?

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1 "A Not if the use of my name or reports is intended
2 to connote either that I had made a clinical diagnosis or that
3 I had authorized the use of my name or work as a B-reader in
4 the W.R. Grace & Company proceeding. See my general statement
5 above and my response to written question numbers 68 to 71
6 above.

7 The use of my B-reader skills result solely in a
8 radiologic diagnostic impression. It is not a clinical
9 diagnosis, was never intended by ILO or NIOSH or me to be a
10 clinical diagnosis, nor should it be treated as such.

11 Question Number 87: "What does Dr. Levine understand
12 to be the criteria for the diagnosis of asbestosis?

13 "A I have no understanding at to the criterial for
14 making a clinical diagnosis of asbestos. As I represented in
15 my general statement, I am not qualified to make such a
16 clinical diagnosis, nor have I ever made such a clinical
17 diagnosis.

18 Question Number 99: "When reviewing x-rays for his
19 non-hospital based B-reading practice, including x-rays for
20 Grace claimants, did Dr. Levine observe all standards put
21 forward by the International Labor Organization that were in
22 effect at the time?

23 "A Hopefully that was my intention.

24 Question Number 101: "Did Dr. Levine assess quality
25 assurance and quality control over the x-rays that he reviews

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1 this -- when reviewing x-rays for his non-hospital based
2 B-reading practice, including x-rays of Grace claimants?

3 THE COURT: I'm sorry, Mr. Finch, I didn't get that.
4 Would you repeat that?

5 MR. FINCH: Yes, I think there's a typo in the
6 question. I'll reread the question.

7 "Q Did Dr. Levine assess quality assurance and
8 quality control over the x-rays that he reviews this -- when
9 reviewing x-rays for his non-hospital based B-reading practice,
10 including x-rays of Grace claimants?

11 "A I do not know the identity of the Grace
12 claimants, nor am I responsible for assessing quality control
13 or quality assurance. See my general statement and my contact
14 template. Nonetheless, I evaluate the quality of each x-ray
15 film sent to me for my review as a B-reader and check the
16 appropriate box on each ILO form I prepare. I also incorporate
17 by reference herein my response to written question number 106.

18 MS. HARDING: 109.

19 MR. FINCH: 109? I think we withdrew 109, Barbara.

20 MS. HARDING: Oh, okay. It's not on ours.

21 Question 161: "Are you qualified to render a
22 clinical diagnosis of asbestos related disease?

23 "A No, nor have I ever done so.

24 Question number 162: "Should any court or tribunal
25 rely on any of your reports, whether it be ILO worksheets,

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1 narrative radiographic reports, or any other reports you may
2 have rendered to establish a clinical diagnosis of asbestos
3 related disease?

4 "A No. By way of further answer, as is set forth
5 in my general statement above, and as is reflected in the
6 template contract pursuant to which I render services as a
7 B-reader and my answer to written question numbers 67, 82 and
8 138 above, no clinical diagnosis of any occupational dust
9 disease including asbestosis or any asbestos related disease
10 can be made by a B-read alone. My B-read reports and ILO
11 worksheets are all bottomed upon my B-reads. None constitute
12 clinical diagnosis nor are they ever intended to constitute
13 clinical diagnosis nor does science permit that any such
14 reports constitute clinical diagnosis. Although I'm reluctant
15 to tell a court what it should or should not rely upon, I can
16 represent that in my view as board certified radiologist who is
17 also a NIOSH certified B-reader, it is a mistake to rely upon a
18 B-read for any purpose other than for which it was originally
19 designed and intended.

20 More specifically, no B-read can or does conclusively
21 or clinically establish the presence (or absence) of any
22 occupational dust disease. Thus, none of my reports and I
23 believe no report from any other B-reader, can or should be
24 relied upon or considered as a clinical diagnosis of an
25 asbestos related disease or any occupational dust disease.

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1 Question number 167: "In your opinion, do you need
2 to be a treating physician in order to read x-rays to determine
3 if they are consistent with asbestos?

4 "A No. In order to provide a radiologic impression
5 as a NIOSH certified B-reader, one need not be a treating
6 physician. I incorporate by reference herein my general
7 statement above.

8 Question 168: "What materials, e.g., medical
9 literature, your own training, et cetera, do you rely upon in
10 assessing an x-ray for purposes of determining whether it shows
11 any markings that the x-ray is consistent with asbestosis?

12 "A The ILO standard films and a view box, together
13 with my training and experience.

14 Question 173: "When you state that a B-reading is
15 consistent with asbestosis, what do you mean?

16 "A I mean that on application of my skills as a
17 NIOSH certified B-reader, the film I'm reviewing discloses
18 findings that suggest a radiologic impression consistent with
19 asbestosis. By way of further answer, I incorporate my general
20 statement and my responses to written question numbers 67, 82,
21 83, 94 and 138.

22 Question 174: "Are all of your B-reads based on
23 generally accepted criteria in the scientific or medical
24 community?

25 "A Yes.

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1 Question 176: "In your experience, is it common for
2 a physician to rely on another physician's work in making a
3 diagnosis?

4 "A It is common, indeed, essential, for physicians
5 to rely upon another physician's work in order to reach a
6 clinical diagnosis.

7 Question 178: "Have all your B-reads of x-rays been
8 completed to the best of your abilities with honesty and
9 without intention to defraud?

10 "A I resent having to respond to this question.
11 Yes.

12 Question 179: "Would you ever state that you have
13 read an x-ray as consistent with asbestosis or any other
14 asbestos related disease if you did not believe it to be true?

15 "A I resent having to respond to this question.
16 No.

17 Question 180: "Do you stand behind the quality and
18 accuracy of the B-reading work you have done involving the
19 reading of x-rays at the request of individuals who were
20 involved in asbestos personal injury litigation?

21 "A I resent having to respond to this question. I
22 stand beyond the quality and accuracy of all of my work as a
23 B-reader. When performing my B-reads I am unaware whether the
24 persons whose films I am reviewing as a NIOSH certified
25 B-reader are involved in asbestos personal injury litigation or

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1 whether the request for my review is from persons or entities
2 involved in asbestos personal injury litigation.

3 By way of further answer, I incorporate my general
4 statement above and my answers to written question numbers 37,
5 62, 82, 138, 94 and 68 to 70.

6 Question 185: "Can a person have asbestosis even if
7 it is not detectible on a chest x-ray?

8 "A Yes. I incorporate by reference my general
9 statement above and my answers to written question number 94,
10 among others.

11 Question 186: "Can asbestosis be detectible by
12 pathology even if it is not detectable on a chest x-ray?

13 "A Yes. I incorporate by reference my general
14 statement above and my answer to written question number 94,
15 among others.

16 Question number 187: "Please describe the phenomenon
17 of inter -- i-n-t-e-r reader variability.

18 "A Generally speaking, two persons making different
19 findings on reading the same x-ray. In view of the limitations
20 inherent in reaching conclusions from shadows or densities, as
21 they may appear on x-rays, and the subjective nature of
22 B-reading, it would be expected that there would necessarily be
23 inter-reader variability, the extent of the variability hinging
24 on many conditions, including the number of readers.

25 By way of further answer, I incorporate my general

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1 statement and my response to written question numbers 146, 148
2 and 149 above.

3 Question 188: "Please describe the phenomenon of
4 intra, i-n-t-r-a reader variability.

5 "A Generally one person making different findings
6 on reading the same x-ray on two or more occasions over time.
7 I incorporate by reference by general statement above and my
8 answer to written question number 37.

9 Question number 190. "Do you believe that applicable
10 medical standards require that your own B-reading opinions must
11 be confirmed by some other doctor before they can be relied
12 upon?

13 "A I am unable to answer written question number
14 190 as written. The answer would hinge upon the purpose for
15 which my B-reading would be relied upon. If the purpose is
16 limited to a doctor's reliance upon my radiologic impression,
17 the answer is no. See e.g., my answers to written question
18 numbers 83, 138, 88, 82 and my general statement above.

19 Question number 191: "Do you believe that the ILO
20 2000 international classification of radiographs of
21 pneumoconiosis require that a B-reader's opinion concerning a
22 chest x-ray must be confirmed by a second B-reader before the
23 initial x-ray reading can be relied upon for medical or
24 diagnostic purposes?

25 "A I am unable to answer written question 190 as

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1 written. (I think that's a typo). The answer would hinge upon
2 the purpose for which my B-reading would be relied upon. If
3 the purpose is limited to a doctor's reliance on my radiologic
4 impression, the answer is no. See e.g., my answers to written
5 question numbers 83, 138, '88, 82 and my general statement
6 above."

7 MR. MENDELSON: Shall I read the verification at the
8 end?

9 MS. HARDING: Yes, if you would read the
10 verification, please, thank you.

11 MR. MENDELSON: The last page says, verification, I
12 Dr. Richard B. Levine, under oath and penalty of perjury do
13 state that I have read my response to W.R. Grace and Company's
14 deposition by written question ("response") and know of the
15 contents thereof, that said response was prepared by me with
16 the assistance and advice of my counsel and that response is
17 the full and complete truth, to the best of my knowledge,
18 information and belief. Signed, Dr. Richard B. Levine, sworn
19 and subscribed to before me, the undersigned notary public, in
20 and for Philadelphia County, Pennsylvania 9 -- January, 2007.
21 And then you have the notary's notation.

22 MR. FINCH: Thank you, Dr. Levine.

23 MS. HARDING: Thank you. Your Honor, we have a few
24 documents we're going to seek to admit.

25 THE COURT: All right.

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1 MS. HARDING: The first one is GX-0413, the contract
2 referred to by Dr. Levine.

3 MR. FINCH: No objection, Your Honor.

4 THE COURT: It's admitted.

5 MS. HARDING: GX-0007.3048870, which is the composite
6 of the sample of PIQ's where claimants have indicated on the
7 questionnaire itself that Dr. Levine is the diagnosing doctor.

8 MR. FINCH: We objection on relevance ground as to
9 questionnaire evidence and on hearsay grounds to the extent
10 that the questionnaires have materials that are not business
11 records of Dr. Levine. The same objection we basically raised
12 to the questionnaire this morning, that we're going to brief,
13 Your Honor.

14 MS. HARDING: And just one response, Your Honor.
15 With respect to, obviously, the first two questions of
16 relevance which is the one that we discussed yesterday, which I
17 think we've got kind of a standing ruling on that, but you may
18 revisit it later. With respect to the question with respect to
19 the admissibility of the PIQ's themselves we're going to brief,
20 I won't respond to that now.

21 But I do think as a separate grounds for introduction
22 of this composite sample of questionnaires where claimants in
23 this matter have indicated that Dr. Levine is their diagnosing
24 doctor, it's not being offered, obviously, for the truth of the
25 matter that Dr. Levine actually diagnosed them with asbestosis,

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1 it's being offered for the purpose of demonstrating quite the
2 opposite.

3 THE COURT: Okay. So, the limitation on this offer
4 is simply to show that there is a composite exhibit in which
5 claimants have identified Dr. Levine as a diagnosing doctor,
6 although his testimony is that he is not and has never been a
7 diagnosing doctor for purposes of the W.R. Grace case.

8 MS. HARDING: What I would say, Your Honor, is that
9 that's one -- that's one of the reasons we're seeking it, and
10 for that purpose I think it's admissible. I'm not abandoning
11 the other reasons why we think the questionnaires are
12 admissible.

13 MR. FINCH: Your Honor, I think they're still
14 offering it for the truth. If a questionnaire written by John
15 Smith asks a question, who is your diagnosing doctor and John
16 Smith writes Dr. Levine, they're offering it to prove the truth
17 that claimant John Smith said Dr. Levine was his diagnosing
18 doctor. That's offered for the truth, that's hearsay.

19 THE COURT: Right.

20 MS. HARDING: Well --

21 THE COURT: Well, I think that's offered at this
22 point to show that Dr. Levine's testimony is that he isn't a
23 diagnosing doctor, but the evidence in the case that's being
24 submitted in support of the claims, that Grace is contending
25 are not claims that it should have to reconcile in or outside

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1 the tort system because the diagnosing doctors listed by the
2 claimants are, in fact, not the diagnosing doctors because the
3 claimants say they're Dr. Levine. And in fact, Dr. Levine is
4 saying he's not their diagnosing doctor. So, the issue is
5 whether or not for purposes of counting claims, these claims
6 can be counted and it's highly relevant to that purpose, but
7 it's not relevant, that I can see at the moment, for any
8 purpose other than that, but it is relevant for that purpose
9 and it's also not hearsay for that purpose because in that
10 sense it is an admission against interest because this is, in
11 this instance, a claim that the Debtor has to reconcile to
12 determine whether or not it is a claim that the Debtor has to
13 pay for estimation purposes.

14 So, at this point in time, in the Debtor's theory of
15 the case, it seems to me that that piece of information is
16 relevant and this is the means by which the Debtor can go about
17 proving that piece of evidence on the Debtor's theory of the
18 case. So, I think it's relevant and it's admissible and I
19 believe it's in a statement against the claimant who asserts
20 that the claimant has a claim to be counted as a valid claim
21 that the Debtor would have to pay in a tort system, which is
22 the ACC's theory of the case at this point in time and it's the
23 ACC that's the party. So, I think in this instance that
24 information is all relevant.

25 MR. FINCH: Your Honor, it still doesn't cure the

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1 hearsay objection. I don't think that the claimants are
2 parties, I think this is part of what we should be briefing to
3 Your Honor.

4 THE COURT: Okay. You can add that to the brief
5 issue, but I think in this instance this one probably survives,
6 it's for a different purpose. But in any event, I'll take this
7 one also advisement. I don't see any other purpose for the
8 proffer right now, but this, so Ms. Harding what other purposes
9 to this proffer are there?

10 MS. HARDING: Your Honor, the purpose for which -- I
11 mean the purpose you identified is obviously one of the
12 purposes, but the other purpose is actually, this is an
13 estimation proceeding and we are having to estimate the
14 liability for claims. And we think that the submission of
15 information to this Court by claimants that has been
16 demonstrated to not be -- to be false, or at least there's an
17 indicia of inaccuracy with respect at least to the information
18 provided to the Court in the questionnaires is information that
19 should be taken into consideration, in the Court's estimation
20 of Grace's liability in this case.

21 THE COURT: Because somebody lists a doctor who gave
22 them a B-read as a treating physician, I'm supposed to
23 determine that the rest of the information is false?

24 MS. HARDING: Well, Your Honor, it's just one piece
25 of evidence in a large, broader case that's going to be built

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1 over time with pieces of evidence over time and I think it's a
2 relevant fact for the Court to consider in that process.

3 THE COURT: I agree. It would go to the weight, but
4 in this instance, these are not the lawyers filling out these
5 claim forms, at least the one I just happened to open to, as
6 part of this exhibit to see what the exhibit was. This is a
7 person, who is filling out this form, and although the doctor
8 can undoubtedly not be a treating physician and understand what
9 that is, this is a claimant filling out this particular form.
10 So, yes, it may go to the weight, but just because somebody
11 puts down somebody's name as a treating physician and gets a
12 B-read and it's not a treating, I don't know that you're going
13 to get an inference from me that says that everything is false
14 because they list a doctor as a treating physician and he's
15 not. That's going kind of far, Ms. Harding.

16 MS. HARDING: I'm not asking for that at this time,
17 Your Honor.

18 THE COURT: Okay.

19 MS. HARDING: It's just one piece of evidence.

20 THE COURT: Just so you know. That's going a little
21 far.

22 MS. HARDING: I understand.

23 THE COURT: Okay. And let me make a note, please, so
24 I know that I have to look at this one in conjunction with the
25 brief, so give me one second, please.

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1 Okay. As I said, I will take this one, this
2 submission under advisement and see what happens when I get the
3 briefs. Okay, next?

4 MS. HARDING: Okay. Thank you, Your Honor. I only
5 thing I did want to note is that if you look through the rest
6 of the composite exhibit you will see that they aren't all --
7 that there are law firms that were involved in the process of
8 submitting the claims.

9 THE COURT: Yes, I understand that that's the case,
10 from having looked at some other of the PIQ's in other
11 instances, but the particular one that I happened to turn to
12 happened to be from a claimant.

13 MS. HARDING: I understand, Your Honor. The Debtors
14 move to submit GX-0408.

15 THE COURT: And it is what?

16 MR. FINCH: This is -- we have an objection on
17 relevant grounds. It's a piece of a questionnaire, there's no
18 hearsay objection to this, however, because it's a medical
19 treatment record from Dr. Levine.

20 MS. HARDING: I think it's the general relevance
21 objection discussed yesterday.

22 THE COURT: Excuse me one second here. 0408, it's
23 marked as no objection.

24 MR. FINCH: That was no authenticity objection, Your
25 Honor. The --

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1 THE COURT: Oh, I see.

2 MR. FINCH: We don't object that it's -- we agree
3 it's authentic, but we object on relevance grounds.

4 THE COURT: And what's the purpose? What's the
5 purpose for this offer?

6 MS. HARDING: I'm sorry, I'm looking, Your Honor.
7 Your Honor, the next -- the series of 0 -- I'm sorry 408, 409,
8 410 and 411 are just demonstrations of language used in Dr.
9 Levine's medical reports, the different kinds of reports that
10 he issues, that he discussed in his deposition by written
11 question.

12 MR. FINCH: And, Your Honor, our objections to 409
13 and 410 are on relevance grounds because they are -- excuse me,
14 our objections to 408 and 409 are relevance grounds because
15 they are portions of a questionnaire. As to 410 and 411, we
16 have no objection.

17 THE COURT: Well wait, I need to do them one at a
18 time. 408 is simply a portion of a summary of somebody looking
19 at a chest x-ray and describing the report of the examination
20 of the chest x-ray, of a particular person.

21 MR. FINCH: Right, but it's --

22 MS. HARDING: It's by Dr. Levine, it's a medical
23 record of Dr. Levine's and we're offering it for the purpose of
24 understanding his testimony with respect to the language he
25 uses in his reports.

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1 MR. FINCH: And the relevance objection is, Your
2 Honor, solely because if you see at the top it says, Grace PIQ
3 and we basically view anything that came in through the PIQ
4 process is irrelevant.

5 THE COURT: Actually, I don't see that.

6 MR. FINCH: There's a little bar code --

7 MS. HARDING: Top right corner.

8 MR. FINCH: Top right.

9 THE COURT: Oh, I see, okay.

10 MR. FINCH: That's the basis, you know. if that bar
11 code weren't on there, I wouldn't have an objection, but I have
12 to stand and make a record on the relevance grounds as to
13 anything that comes in through the questionnaire process. So,
14 our objection to Exhibit Number 408 is a relevance objection.
15 The same objection we argued yesterday.

16 THE COURT: Okay. So, the issue is whether or not
17 the type of language that Dr. Levine says he uses in the report
18 is the language that he uses?

19 MS. HARDING: Well, Your Honor, 408 and 409 are both
20 medical reports submitted by claimants in this case.

21 THE COURT: Yes.

22 MS. HARDING: That were authored and were prepared by
23 Dr. Levine.

24 THE COURT: Yes.

25 MS. HARDING: So, as I understand the objection, the

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1 ACC don't have any objection to there -- the only objection
2 they have has to do with the issue of relevancy of getting in
3 PIQ information in this case.

4 THE COURT: Yes.

5 MS. HARDING: And I thought the Court didn't want us
6 to argue that any more. And so, we weren't going to --

7 THE COURT: But why are you offering it?

8 MS. HARDING: We're offering it, Your Honor, in this
9 case to show how Dr. Levine's reports have been used by
10 claimants in this case, in ways that are sometimes contrary to
11 the way that Dr. Levine said they should be used.

12 THE COURT: Okay. So, this is another instance in
13 which, except this particular number 408 doesn't seem to
14 identify Dr. Levine as some treating physician, and it's signed
15 by him.

16 MS. HARDING: No, Your Honor, we're simply offering
17 it as factual information about -- that gives information about
18 how Dr. Levine records his reports, what he does, how he does
19 it.

20 THE COURT: Yes.

21 MS. HARDING: And, that the information is being
22 submitted by claimants in this case and used in various ways.
23 We're not making any representations for us as to how it's
24 actually being used here.

25 THE COURT: But it has to be relevant to something.

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1 Just because a claimant used it for something, doesn't mean
2 ti's relevant. So, what is it relevant to? Just because Dr.
3 Levine wrote a report doesn't mean it's relevant to something
4 and I'm missing the connection.

5 MS. HARDING: Well it's --

6 THE COURT: Having listened to the deposition, I
7 don't know what it's relevant to, I'm sorry, but I'm missing
8 the point.

9 MS. HARDING: Well, it's relevant to this particular
10 claimant's medical condition.

11 THE COURT: Okay.

12 MS. HARDING: It's relevant to how the report was
13 used by other doctors in determining whether or not they
14 rendered a diagnosis or not. It's a medical record --

15 THE COURT: Well, it's relevant to whether he
16 rendered a diagnosis.

17 MS. HARDING: Your Honor, the Debtor's position is
18 that medical records, medical evidence of the claimants in this
19 case is relevant. It gets relevant to the underlying issue of
20 whether Grace has liability for claims --

21 THE COURT: Look, this --

22 MS. HARDING: and how -- I'm sorry.

23 THE COURT: -- this particular document which is
24 signed by Dr. Levine says, interstitial fibrosis at the lung
25 bases indicating previous occupational asbestos exposure,

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1 diagnostic of asbestosis. That's what this report says.
2 That's his report, that's what he says.

3 MS. HARDING: Right.

4 THE COURT: Okay.

5 MS. HARDING: And Dr. Levine has indicated in his
6 testimony that he never diagnosis, he says he does not know how
7 to diagnose asbestos related disease.

8 THE COURT: Okay. Now, I understand.

9 MS. HARDING: I'm sorry I was not clear, Your Honor.

10 THE COURT: All right. Now I see what you're doing.
11 So, you're trying to use this report as impeachment for Dr.
12 Levine's testimony.

13 MS. HARDING: Yes.

14 THE COURT: Okay. Now, your report (sic) is that
15 it's not relevant because it came in through a PIQ?

16 MR. FINCH: Yes. That's the --

17 THE COURT: All right. That's overruled. It's
18 clearly impeachment.

19 MS. HARDING: I apologize, Your Honor.

20 THE COURT: All right, now let me make a note.

21 MR. FINCH: By PIQ, you meant P-I-Q, Your Honor, is
22 that correct?

23 THE COURT: Yes.

24 MR. FINCH: Okay.

25 THE COURT: So, Exhibit 408 is admitted. Okay, next

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1 is 409?

2 MS. HARDING: Yes, Your Honor, and we offer it for
3 the same reason. If you refer to the language on the second
4 page of the exhibit.

5 MR. FINCH: And we have a relevance objection on the
6 grounds that it was material produced in response to the
7 questionnaire discovery which we believe is not relevant to an
8 estimate of what Grace's cost to resolve tort claims would be,
9 had it not gone into bankruptcy.

10 THE COURT: Okay. This, again, however, is also
11 appropriate impeachment because it contains, essentially, the
12 same language "diagnostic of asbestos". And so, therefore, it
13 is also appropriate impeachment for that purpose. So, Exhibit
14 409 is also admitted and let me make a note.

15 Okay, thank you. Next, 410?

16 MS. HARDING: Yes, Your Honor, I'm just looking for
17 my --

18 MR. FINCH: We have no objection to 410, Your Honor.

19 THE COURT: All right, it's admitted.

20 MS. HARDING: And 411.

21 MR. FINCH: We have no objection to Grace Exhibit
22 411, Your Honor.

23 MS. HARDING: And the final exhibit, Your Honor, is
24 412.

25 THE COURT: 411 is admitted. 412.

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1 MS. HARDING: I think there's no objection.

2 MR. FINCH: There's no objection to 412.

3 THE COURT: 412 is admitted.

4 MR. FINCH: And, Your Honor, the ACC is going to
5 offer one exhibit through this witness, which has been marked
6 Grace Exhibit Number 414, that is the Curriculum Vitae of Dr.
7 Richard Levine, which he referred to in a couple places in his
8 deposition question responses.

9 THE COURT: All right.

10 MS. HARDING: No objection, Your Honor.

11 THE COURT: It is admitted. Okay.

12 MS. HARDING: Your Honor, we're going to move now to
13 the playing of very short clips of the four individuals, two
14 doctors, two screeners, who have taken the 5th Amendment in
15 this case during their depositions. As Mr. Bernick indicated
16 before the break, the entire designation we are providing to
17 the Court, but we are only going to play a short snippet.

18 THE COURT: All right.

19 MS. HARDING: Thank you. Your Honor, the first is
20 Mr. Keith Mason, and we'll play a short snippet and we do have
21 a couple of exhibits we'll be seeking to admit.

22 THE COURT: All right.

23 MS. HARDING: Thank you. And Mr. Mason was, I
24 believe -- well -- I'm sorry, Your Honor. It was a 30(b)(6)
25 deposition of N&M which is a screening company and he was the

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1 representative.

2 THE COURT: Okay, thank you.

3 MS. HARDING: And I think he's also the principle at
4 the company.

5 THE COURT: All right.

6 (Videotaped deposition of Keith Mason played into record)

7 MS. HARDING: Your Honor, as Mr. Bernick indicated at
8 a later time, we may be seeking to seek adverse inferences with
9 respect to many of -- the information that was sought from Mr.
10 Mason during his deposition. At this time though we just want
11 to move into admission Exhibit GX-0131 which was placed in
12 front of Mr. Mason during his deposition.

13 THE COURT: And what is that?

14 MS. HARDING: That is a brochure describing the
15 practices of N&M.

16 THE COURT: Is there a copy somewhere?

17 MS. HARDING: Yes, Your Honor, I'm sorry, it's in
18 your binder.

19 MR. FINCH: No objection to Grace 131, Your Honor.

20 THE COURT: All right. I haven't seen it yet, just
21 one second please. Thank you. And this is 131?

22 MS. HARDING: Yes, it is, Your Honor.

23 THE COURT: All right, it's admitted, thank you.

24 MS. HARDING: The Debtors proffer GX-0133, which is a
25 customer list of N&M.

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1 MR. FINCH: No objection.

2 THE COURT: It's admitted.

3 MS. HARDING: And the Debtors proffer GX-0134, which
4 is an attorney selection from N&M.

5 MR. FINCH: No objection.

6 THE COURT: It's admitted.

7 MS. HARDING: Your Honor, the next video clip will be
8 from Mr. Charlie Foster, who also appeared as a 30(b)(6)
9 representative of the screening company RTS.

10 THE COURT: All right.

11 (Videotaped deposition of Charlie Foster played into record)

12 MS. HARDING: Your Honor, pursuant to the Court's
13 directive earlier today, we will submit summary exhibits with
14 respect to the various doctors and screeners that you've seen
15 today.

16 THE COURT: All right.

17 MS. HARDING: So, we do have five exhibits we'd like
18 to move in with respect to Mr. Foster's deposition. The first
19 is GX-0119, which are RTS doctor contracts.

20 MR. FINCH: No objection.

21 THE COURT: One second. All right, it's admitted.
22 Thank you.

23 MS. HARDING: The next one is GX-0120, which are law
24 firm contracts with RTS.

25 MR. FINCH: No objection.

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1 THE COURT: Admitted.

2 MS. HARDING: GX-0121 which are intake forms, or
3 commonly referred to as A sheets, from RTS.

4 MR. FINCH: No objection. I would note that there is
5 somebody's social security number at the top of the document.
6 I don't know how the Court wants to handle --

7 MS. HARDING: Well, we have been trying to redact
8 those, Your Honor, so if that's there, that's just a mistake.

9 MR. FINCH: This is Exhibit 121?

10 THE COURT: I'll cross off the one on 121 that I have
11 in this binder. Why doesn't everyone else do the same thing.

12 MR. FINCH: Okay. I think it's on both pages of the
13 exhibit.

14 THE COURT: The last four digits should remain,
15 correct, but the rest of the social security number should be
16 redacted? Is that the format that you've been using?

17 MR. FINCH: It doesn't matter to me, Your Honor.

18 MS. HARDING: We have generally been -- I think we've
19 been generally taking off the last four -- okay, last four,
20 Your Honor, yes.

21 THE COURT: Letting the last four remain.

22 MS. HARDING: Yes, letting the last four remain,
23 taking off the first.

24 THE COURT: Okay. That's what I've done with respect
25 to that. So, 8801 remains and the rest is taken off. Okay.

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1 One second. Okay. It's admitted.

2 MS. HARDING: The next one, Your Honor, is GX-0122,
3 further intake forms or A sheets for RTS.

4 MR. FINCH: No objection, Your Honor, but there is
5 this gentleman's social security number.

6 THE COURT: Okay, one second. Okay, this one is just
7 on one page, correct?

8 MR. FINCH: It's only a one page exhibit.

9 THE COURT: Yes.

10 MR. FINCH: At least my copy is.

11 THE COURT: Yes, okay. I've taken off the first five
12 digits. Okay, it's admitted.

13 MS. HARDING: And GX-0123, which is an attorney
14 selection sheet, sheets.

15 MR. FINCH: No objection, Your Honor, although --

16 MS. HARDING: It's the same thing, I see the same
17 thing.

18 MR. FINCH: There's some social security numbers on
19 this, too, on the second and third pages.

20 THE COURT: All right, I've taken off the social
21 security numbers and it's admitted.

22 MS. HARDING: Thank you, Your Honor. We'll be
23 playing next the certain testimony from Dr. Ray Harron, who is
24 listed on the exhibit from Dr. Henry that I provided to the
25 Court earlier and it was admitted yesterday.

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